HIGH COURT OF UTTARANCHAL AT NAINITAL

(Chapter VIII Rule 32 (2) (b)
Description of the Case.)

Criminal Writ Petition NO. 443 of 2003

Dated of Decision: 16th May, 2006

A.F.R. (Approved for reporting)

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Not approved for reporting.

Dated 16-5-2006 Initial of Judge.

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Writ Petition No. 443 of 2003

Yogesh Kumar Gupta,
S/o Late Sri M.L. Gupta,
R/o 2, New Garden Cottage
Mansharam Cricket, Landour Cantt
Massoorie, District-Dehradun .....Petitioner.

Versus

1. State of Uttaranchal
2. Sri Devendra Kumar Mittal
   S/o Late Sri Om Prakash Mittal
   R/o Spring Villa State, Landour, Mussoorie,
   District- Dehradun ...Respondents.

Sri Alok Mehra, learned counsel for the petitioner.
Sri L.K. Tiwari, learned counsel for the respondent No. 2.
Sri A. Rab, learned Addl. G.A., Shri L.M. Verma, learned A.G.A. for the State.

Hon'ble J.C.S. Rawat, J.

This writ petition has been directed to issue a writ in the nature of certiorari for quashing the order dated 08.08.2002 passed by the learned Chief Judicial Magistrate, Dehradun in Criminal Case No. 426 of 2000 u/s 138 of the N.I. Act and also the judgment and order dated 18.11.2002 passed by the learned Sessions Judge, Dehradun in Criminal Revision No. 93 of 2002.

Brief facts for the disposal of this petition are that the complainant-respondent No. 2 filed a complaint u/s 138 of the Negotiable Instrument Act and accused-petitioner was summoned by the trial court. Thereafter, objection was filed before the court below and the said objection was rejected by the C.J.M. Thereafter, evidence proceeded in the matter. During the trial the complainant intended to produce one Sri R.D. Gupta as a witness. Since no list of witnesses was available on record, as such, the request made by the complainant was opposed by the petitioner and thereafter a list of witnesses was filed by the complainant and the learned Chief Judicial Magistrate accepted the same despite the objection of the petitioner. The learned Magistrate accepted the list and rejected the objection of

the petitioner. Feeling aggrieved by the said order, revision was preferred before the Revisional Court. The learned Sessions Judge vide his order dated 18.11.2002 had dismissed the revision on the ground that non-compliance of the mandatory requirement of Section 204 (2) Cr. P.C. is mere irregularity which is curable. Feeling aggrieved by the said order, the present writ petition has been preferred before this court.

I have heard learned counsel for the parties and perused the record.

At the outset, I would like to mention here that the present writ petition is not maintainable before this court as the petitioner had got the other efficacious remedy available to him. The petitioner should have filed the petition u/s 482 Cr. P.C. but he had not resorted that said remedy as such, the petition under Article 226 of the Constitution of India is devoid of merit.

On merit it is true that as per the provision of Section 204(2) Cr.P.C., no summon or warrant shall be issued unless the list of the witnesses had been furnished by the complainant.

Now it is to be seen whether the non-compliance of this provision is merely an irregularity or the proceeding in the case before the court below in absence of the list stand vitiated on this account only. It is well settled principle of law that if nothing has been provided in any of the procedural law, the word ‘shall’ will be read as ‘may’. If any mandatory provision has been provided under the substantive law. The interpretation of the word ‘shall’ would be otherwise. In case of procedural law, ‘shall’ should be read as ‘may’.

The perusal of the said provision reveals that the provision does not mean that the complainant may not filed any additional list at the time of the trial. If the trial had proceeded and the complainant intends to give the further list, he had the right to give the additional list before the court below. The omission to file the list of witness u/s 204(2) Cr. P.C. is not a mandatory in nature and it

does not vitiate the proceedings. It is an irregularity which can be cured by the subsequent filing the list of the witnesses. In the instant case, the subsequent list has been filed before the trial court, as such, I am completely in agreement with the findings recorded by the learned Sessions Judge. I am also fortifies with the view taken by the **Allahabad High Court in Molvi Habibur Rahman Faizi & others Vs. state of U.P. & Another reported in [1997 JIC 816 (All)].**

In view of the forgoing discussion, I am of the view that this writ petition is devoid of merit and is liable to be dismissed and the same is dismissed accordingly.

(J.C.S. Rawat, J.)

16th May, 2006
Shiv